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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 305.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner,*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board.

JACOB BLUM,
individually and as Regional Attorney for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER

FRED H. SKINNER,
H. H. RUMBLE,
Solicitors for the Petitioner.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court has not been reported. That of the Circuit Court of Appeals is reported in 91 Fed. (2), 730. Both appear in the

record; that of the District Court at p. 88 et seq., that of the Circuit Court of Appeals at p. 104.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on August 2, 1937. (R. 105).

The petition for a writ of certiorari was filed on August 11, 1937, and granted on October 11, 1937.

The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925. The bill in the District Court presented a controversy arising under the constitution and laws of the United States and alleged that the matters and interests in controversy exceed the sum or value of $3,000.00, exclusive of interest and costs (Art. 29, R. 18) and also alleged facts supporting these allegations, all of which were admitted by Respondents' motion to dismiss the bill (R. 70).

Statute Involved

The National Labor Relations Act (Act of July 5, 1935, c. 375, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 et seq.) and certain rules and regulations promulgated by the Board purporting to have been made pursuant to said Act, appear in the record. (R. 27 et seq.)

STATEMENT OF THE CASE

The facts alleged in the bill and admitted on the motion to dismiss, are given below. The abbreviation "Art." used in the following statement refers to Articles of the bill.

Facts

Petitioner is a corporation organized and existing under the laws of the State of Virginia, and owns and operates a single, complete and independent shipyard located at Newport News, Virginia. (Art. 1, R. 1). It there designs and builds ships under specific contracts previously made in each case. Incidental to its principal business of designing and building ships, it has built certain machine products, such as hydraulic or water turbines, and repairs such vessels as are sent or come to it for the purpose of having repairs made, all such work being performed as in the case of its shipbuilding business, only under specific contracts therefor. (Art. 7, R. 5).

Petitioner fabricates substantially all materials used in doing the work herein described, and, for the most part, builds the machinery for each ship built by it. The cost of the materials so used by it in its shipbuilding business and in the hydraulic work so done by it represents less than one-half the entire cost of the work and the cost of materials used in the ship repair work represents only a small fraction of the cost of performing such repairs. (Art. 8, R. 5).

All said ships when built or repaired are delivered to the owners thereof at petitioner's shipyard, Newport News, Virginia, except that vessels built for the United States Navy are delivered at the United States Navy Yard, Norfolk, Virginia. (Art. 8, R. 5). When the completed vessels leave the shipyard they leave "light," that is, no cargo is put aboard or carried away, and Petitioner's connection therewith is thereupon terminated. (Exhibit D, par. 3, R. 63). Petitioner

does not engage, or cause any such vessel to be placed or engaged, in commerce of any kind. (Art. 12, R. 7). In each case of a merchant vessel the master recruits and signs on his crew. Petitioner has not now and has never had anything to do with the manning or operation of any vessels built or repaired by it. (Exhibit D, par. 3, R. 63). It is not now and has never been, nor are its employees, engaged in commerce or in business affecting commerce. (Art. 24, R. 17).

Petitioner did no merchant shipbuilding between June, 1934, and January, 1937. Of its total business in 1936, 91.4% was shipbuilding confined solely to vessels for the United States Navy, 5.8% was repair work and 2.8% consisted of hydraulic turbine construction.

When the bill was filed, petitioner was building six (6) men of war vessels for the United States Navy (63,920 tons) and three (3) small merchant harbor craft aggregating 2,264 gross tons. (Art. 19, R. 14).* The time required to build such vessels ranges from 30 to 32 months in the case of destroyers and 36 months or more in the case of cruisers and air craft carriers. (Exhibit D, par. 4, R. 63).

In 1936, Petitioner employed only 8/100 of 1% of the steel plates, shapes and bars produced in the United States in that year and such materials constitute by far the larger part of all materials used in

*Since the bill was filed one of the three naval vessels and two of the merchant vessels mentioned above have been completed and delivered.

the shipbuilding business. (Exhibit D, par. 5, R. 63). Petitioner pays annual local taxes on the materials employed in its business. (Exhibit D, par. 6, R. 64).

When the bill was filed, Petitioner employed approximately 7500 employees.* (Art. 7, R. 5). The relations between petitioner and its employees have always been and are now entirely harmonious. (Arts. 15 and 17, R. 11; 12). No labor dispute exists between them. (Exhibit C, R. 61). Allegations to the contrary in the charges brought against petitioner by the Board are erroneous.

Since 1927, there has existed among Petitioner's employees and now exists an organization created and controlled by themselves known as the "Plan of Representation of Employees in the Plant of the Newport News Shipbuilding and Dry Dock Company." (Art. 15, R. 11). Petitioner has not contributed and does not contribute towards the expenses or funds of said organization and has at no time dominated, influenced or controlled said organization or attempted so to do. (Art. 12, R. 7-8). As late as June 15, 1937, an election was held under the provisions of said Plan in which 90.8% of the employees participated, whereby, for the coming fiscal year the officers of the Plan were elected. (Art. 23, R. 16).

Notwithstanding said facts, on June 4, 1937, one Philip H. Van Gelder, Secretary-Treasurer, Industrial Union of Marine and Shipbuilding Workers of Amer-

*The number of employees has been substantially reduced since the filing of the bill.

ica, 2332 Broadway, Camden, New Jersey, filed with the National Labor Relations Board a paper entitled a "Charge" in which he alleged that the Petitioner is engaged in certain unfair labor practices affecting commerce in that between March 3, 1937, and June 1, 1937, Petitioner discharged and refused to reinstate four (4) of its employees "because they joined and assisted a labor organization of their own choosing and engaged in concerted activities with fellow employees for collective bargaining and other mutual aid and protection"; that Petitioner is dominating and interfering with the rights of its employees to self-organization by sponsoring, dominating, interfering with and lending financial support to the aforesaid plan of representation, all of which affects commerce within the meaning of said Act. (Art. 2, R. 2, and Exhibit B, R. 25). Thereupon the National Labor Relations Board issued and on June 21, 1937, caused to be served upon Petitioner a formal complaint, together with a notice of hearing thereon. (Art. 2, R. 2, and Exhibit A, R. 21). Thereupon, Petitioner brought this suit for a preliminary injunction *pendente lite* as hereinafter set out in greater detail.

The bill denies each and every of these allegations of the Board (Art. 12, R. 7) and alleges that this investigation by the Board was not instigated by the employees of Petitioner or by the above mentioned organization of Petitioner's employees known as the "Plan of Representation of Employees in the Plant of the Newport News Shipbuilding and Dry Dock Company," (Art. 11, R. 6-7), but by the hereinabove named union known as "Industrial Union of

Marine and Shipbuilding Workers of America" with headquarters at Camden, New Jersey, which is affiliated with the organization known as "Committee for Industrial Organization" or "C. I. O."; that said Industrial Union has no standing among the employees at petitioner's shipyard and that its sole aim and purpose in filing said charges with said Board is to force petitioner to cease dealing with its employees with respect to wages and other conditions of employment through said plan of representation and thus enable and assist it, the said Industrial Union, in organizing the employees at Petitioner's shipyard and thereby requiring them to join it, the said Industrial Union, if they wish to work for Petitioner. (Arts. 20 and 21, R. 15).

The bill asserts Petitioner's right to maintain harmonious relations with its employees and its right to deal with them in respect of rates of pay, wages, hours of employment and other working conditions in a manner mutually satisfactory to Petitioner and its employees; asserts that such right is of incalculable value to Petitioner in the successful conduct of its business and that it will suffer irreparable injury if that relationship is upset. (Art 17, R. 12).

Petitioner's said bill of complaint alleged the facts hereinabove set out and other facts showing that it is not engaged in commerce or in a business affecting commerce and showing that the proceedings would cause irreparable injury for which Petitioner has no adequate remedy at law.

The Proceedings Below

The defendants, Schauffler and Blum, Regional Director and Regional Attorney of the Board, respectively, and the Trial Examiner appeared generally in said suit and filed a motion to dismiss Petitioner's bill therein (R. 70) and also filed what they styled "Opposition of Defendants to Motion for Injunction Pendente Lite."

The cause was heard on the motion to dismiss the bill. The District Court held that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, the question whether Petitioner is subject to its jurisdiction and authority (R. 89); that Petitioner has a "plain adequate and exclusive remedy under the terms of the Act itself," and that because that remedy was supposed to be *exclusive,* the Court was without jurisdiction (R. 93); and accordingly dismissed the bill. (R. 96).

The Circuit Court of Appeals affirmed, (Opinion R. 104, Decree, R. 105) and this Court granted certiorari.*

Specification of Errors To Be Urged

Of the assigned errors the following are intended to be urged:

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*Since the filing of the petition for a writ of certiorari, the trial examiner has held a hearing on the charges and complaint filed by the Board; but as yet has made no report to the Board. Under the Act. (Sec. 10 (c)) the Board may require a further hearing or hearings. Until the Board shall have acted, and the possible review by the Court shall have been had, the proceeding remains incomplete, and is a continuing menace. It was not alone from the holding of a hearing, but also from the action the Board might take thereon, and particularly with respect to disturbing the existing relations between Petitioner and its employees, that the damages anticipated, as alleged in the bill, were and are apprehended.

The Circuit Court of Appeals erred:

1. In holding that whether Petitioner is or is not subject to the jurisdiction of the National Labor Relations Board, it must exhaust the so-called administrative remedy provided by the National Labor Relations Act.

2. In holding that although Petitioner may not be subject to the jurisdiction of the National Labor Relations Board, it must nevertheless submit to investigation by that Board.

3. In holding that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, whether a particular industry or concern is subject to its jurisdiction and authority.

4. In holding that an industry or concern which is not engaged in commerce or in a business affecting commerce, when served with a complaint by the National Labor Relations Board, may not challenge the action of said Board by a suit in equity to enjoin the same, but must exhaust its so-called administrative remedies provided by said Act.

5. In failing to hold that on the facts alleged in Petitioner's bill, and admitted by the motion to dismiss, Petitioner is not engaged in commerce or in a business affecting commerce within the meaning of the National Labor Relations Act, and not subject to the jurisdiction of the National Labor Relations Board, and therefore immune from its inquisitorial powers.

6. In failing to hold that upon the facts alleged in Petitioner's bill and admitted on the motion to dis-

miss, the National Labor Relations Board has no function whatever to perform with respect to Petitioner.

7. In affirming the decree of the District Court.

Summary of Argument

This case was disposed of in the District Court on a motion to dismiss the bill. On the facts alleged in the bill and admitted by the motion to dismiss, Petitioner's business is a purely local industry whose activities do not directly or substantially affect interstate or foreign commerce and no labor dispute existed. This Court in the Jones and Laughlin group of cases held that the National Labor Relations Act purports to reach only what may be deemed to burden or obstruct such commerce; that the jurisdiction of the National Labor Relations Board is limited to those instances which fall within the commerce power, and that if the Board should exceed the jurisdiction conferred upon it, any person aggrieved may challenge its action. Under those decisions the business of Petitioner, as disclosed on the record, is not within the scope of said Act, and Petitioner and its relations to its employees are not subject to the jurisdiction of the National Labor Relations Board. Not being subject to the regulatory powers of the Board, Petitioner is immune from its inquisitorial powers. When the Board filed charges and issued a complaint against Petitioner it exceeded its jurisdiction. Petitioner thereupon challenged its action, as this Court said it had the right to do; and in the only appropriate method, namely, by a bill in equity for injunctive relief. The facts alleged in the bill and admitted on the motion

to dismiss amply show that Petitioner would, through the unwarranted action of said Board, suffer irreparable injury, for which it has no adequate remedy at law. The decree of the Circuit Court of Appeals should be reversed, and the cause remanded with instruction to direct the District Court to grant the injunction prayed, and hear the cause on the merits.

ARGUMENT

Introduction

This suit, challenging the jurisdiction of the National Labor Relations Board and praying for a preliminary injunction, was instituted by Petitioner in July, 1937, *after* the decisions by this Court in the Jones and Laughlin group of cases, 301 U. S. 1 et seq. Under the interpretation given the Act in those decisions, it seemed clear that Petitioner is not subject to the jurisdiction of the Board. Yet, singularly enough, the question of the power of the Board to regulate the business of Petitioner, which lies at the very threshold of any attempt by the Board to exercise such power, was not decided by either of the courts below.

A hearing was had in the District Court on the bill of complaint and affidavits filed therewith and the cause was disposed of on respondents' motion to dismiss the bill, on which, of course, the material allegations of the bill were admitted to be true.

The bill describes with considerable particularity the business conducted by Petitioner and avers (Art. 24, R. 17) that neither the transaction of its business nor its relations with its employees with re-

spect thereto constitute commerce among the several states or with foreign nations, nor do they directly affect such commerce, or burden the same or affect the free flow thereof, nor have they led or tended to lead to labor disputes affecting such commerce.

It is significant that in all of the seventeen grounds stated by respondents in their motion to dismiss the bill (R. 70), not one so much as suggests that the bill shows on its face that Petitioner is engaged in a business affecting commerce within the meaning of the Act, and hence subject to the jurisdiction of the Board.

Respondents proceeded throughout upon the theory that although Petitioner may be exempt from the regulatory powers of the Board, yet the latter, having preferred charges of unfair labor practices against it, questions of the Board's jurisdiction are for the exclusive determination of the Board in the hearing of these charges.

This view was accepted and applied by both of the courts below.

The District Court in its opinion (R. 89) said:

> "The case as presented stands on a motion to dismiss. Ordinarily, the effect of such a motion is to admit the truth of all the material and relevant allegations of the bill. That being true, strictly speaking, we have a case presented where the bill negatives the idea that the complainant is engaged in interstate commerce or in any activities which directly and substantially affect that type of commerce. However, I think it is clear nevertheless that the Court must pass on the question of its juris-

diction to hear and determine the controversy presented by the bill and determine whether or not it may grant the relief prayed for. * * *

"It is elementary, I think, in such a situation that a judicial or quasi judicial body, unless the statute creating it otherwise provides, must in the first instance determine whether or not it has jurisdiction; that is to say, whether or not it has authority under the act of Congress or the act of the state legislature, as the case may be, to hear and determine the controversy presented."

It is obvious that the learned District Judge here failed to distinguish between two widely different things:

(1) The undoubted right and duty of such a body to make a *preliminary* inquiry, before public action, for the purpose of informing itself whether a particular concern is subject to its authority; and

(2) Starting a *public* investigation of such concern, notwithstanding it is outside of Federal control; and, in that unauthorized proceeding, and to the exclusion of the courts, determining the question of its own jurisdiction and authority. See p. 33, *post*.

The *per curiam* opinion of the Circuit Court of Appeals is to the same effect, though somewhat more broadly expressed. Thus (R. 104):

"Without expressing any opinion whatever on any aspect of the controversy pending before the Board, we are of opinion that the action of the court below was correct. Plaintiff has an adequate remedy under the statute and may not apply for relief in equity until it has

exhausted the administrative remedy there provided."

This means that although the Petitioner (as admitted by the motion to dismiss) is not engaged in commerce or in a business affecting commerce within the meaning of the Act, yet the National Labor Relations Board having preferred charges of unfair labor practices against it, Petitioner was obliged to submit to be investigated by the Board, whatever the cost and injury involved. We do not so understand the law. So interpreted, the Act would apply without limitation to every business, however local. So interpreted, the Act would have no constitutional basis on which to rest.

This Court, in the Jones and Laughlin and allied cases, has said, in effect, that if the Act could be interpreted to apply to local industries whose activities do not directly and substantially affect commerce, it must fall; that the jurisdiction of the National Labor Relations Board does not extend to such industries; and that if that Board should undertake to transcend the limits of its jurisdiction, any person aggrieved may challenge its action.

Congress, if it had wished to do so, could not have conferred upon the Board jurisdiction to deal with such an industry. The want of jurisdiction is a want of power for any purpose. Such an industry is immune from molestation by the Board. It is beyond the reach of Congress, and the latter could not, if it would, subject it to vexatious and costly hearings on charges which the Board is without authority to make. The expense, the annoyance and damaging

effects of such proceedings cannot be treated as ordinary incidents of litigation of the kind to which every citizen may possibly be subjected.

The procedural provisions of the National Labor Relations Act have been approved by this Court as applied to those concerns which, by the terms of the Act, are subject to the jurisdiction of the Board. Congress could not make those proceedings applicable to a concern which is constitutionally beyond its reach; and has not attempted to do so.

I.

The National Labor Relations Act Has No Application to Peitioner.

On the facts alleged in the bill and admitted on the motion to dismiss Petitioner is not within the purview of the National Labor Relations Act. The bill alleged all of the facts set out in the foregoing statement of facts. The picture there presented is that of a local industry whose activities do not directly or substantially affect interstate or foreign commerce.

The relations between Petitioner and its employees were entirely harmonious. No labor dispute existed.

These facts would have been fully proved, but for the interposition of the motion to dismiss. On the motion to dismiss the District Court treated the allegations of the bill as admitted and said:

> "That being true, strictly speaking, we have a case presented where the bill negatives the idea that the complainant is engaged in interstate commerce or in any activities which di-

rectly and substantially affect that type of commerce." (R. 89).

Notwithstanding this view of the case presented by the bill, the District Court was of the opinion that the question of the jurisdiction of the National Labor Relations Board over Petitioner is for the exclusive determination of that Board in the hearing of the charges preferred by the Board.

That Court held that the Petitioner had "a plain, adequate and *exclusive* remedy under the terms of the Act itself" (Italics supplied); and that because that supposed remedy was *exclusive,* the Court was without jurisdiction of the cause. (R. 93).

This opinion and that of the Circuit Court of Appeals affirming the decree of dismissal (R. 104) pass completely over the question whether the Act itself has or *could* have any application to such an industry as is presented on this record.

This Court has said that the Act purports to reach only what may be deemed to burden or obstruct commerce as therein defined.

In the Jones and Laughlin case, 301 U. S., 1, the Act was challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns.

Of this contention and the argument used in support of it, the Chief Justice said;

> "If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the Federal power which inheres in

the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 549, 550, 554. The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system. Ibid. * * * * The cardinal principle of statutory construction is to save and not to destroy."

The question was whether in the light of this principle the Act could be so construed as to operate within the sphere of constitutional authority. The majority of the Court were of the opinion that it could. It was pointed out that the Act, by its terms, does not purport to reach all industries, but only such as may be deemed to burden or obstruct commerce within the definition of the term "affecting commerce," therein contained.

Of that definition the Chief Justice said:

"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industries regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplat-

ing the exercise of control within constitutional bounds."

It is recognized that the power of Congress over interstate commerce is plenary, and may be exerted to protect that commerce "no matter what the source of the dangers which threaten it."

It is also recognized that this power may extend to activities which, separately considered, are intrastate; provided they have such close and substantial relation to interstate commerce that their control becomes necessary to protect that commerce from burdens and obstructions. Of this power the Chief Justice said:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree."

The industry described in the record in this case is not only a local enterprise; but its activities do not burden or obstruct commerce in any degree. This is admitted by the motion to dismiss. As was said in the Schechter case, to find "immediacy or directness" here would be to find it "almost everywhere".

Should the decisions below stand, there is no conceivable business, however local, however innocent of any direct effect upon interstate commerce, that may not be subjected to costly and harrassing investigations

by the National Labor Relations Board; and that, under the supposed authority of an Act which this Court has said does not purport to apply to such a business. This Court has further said, if we correctly read its opinion, that if the Act could be interpreted to apply to such a business, it must fall by reason of the limitation upon the Federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment.

We think it clear that, if the Act, as a whole, does not apply and could not have been made to apply to a particular business, then no part of the Act can be applied to that business; and that its procedural features, the so-called administrative remedies, are for those whose business is of such a character as to subject them to Congressional control; and may not be applied to others *in invitum*.

Moreover, Petitioner is engaged solely in production. Production is not commerce. See cases cited, page 41, *post*. Petitioner's activities, admitted of record, are not within the scope of the Act.

II.

The National Labor Relations Board Has No Jurisdiction of Petitioner.

This would seem to follow as a necessary corollary to the proposition advanced under Point I above. The National Labor Relations Board is a creature of the National Labor Relations Act. Surely its reach does not extend beyond the constitutional limits of the Act itself. But resort to deduction is unnecessary. This

Court in the group of cases above discussed dealt specifically with the jurisdiction of the Board.

Thus in the Jones and Laughlin case the Chief Justice quoted Sec. 10 (a) of the Act.

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Sec. 8) affecting commerce."

and said:

> "The critical words of this provision, prescribing the limits of the Board's authority in dealing with labor practices are 'affecting commerce'."

Of the definition of the term "commerce" as contained in the Act he said:

> "There can be no question that the commerce thus contemplated by the Act (aside from that within a territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense."

And of the definition of the term "affecting commerce",

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

In *Washington V. & M. Coach Co. v. National Labor Relations Board,* 301 U. S., 142, Mr. Justice Roberts said:

> "As we have had occasion to point out in decisions rendered this day the Act limits the jurisdiction of the Board to instances which fall within the commerce power."

As thus limited the jurisdiction of the Board does not extend to the business of Petitioner as disclosed upon this record. The Board has no authority over Petitioner, and no function whatever to perform with respect to it.

Not being subject to the regulatory powers of the Board, Petitioner is immune from its inquisitorial powers. The Board cannot enlarge its powers by serving a complaint and notice upon Petitioner.

Ellis v. Interstate Commerce Commission, 237 U. S. 434.

In that case the Interstate Commerce Commission reciting that it appeared from a complaint on file that the allowances paid for the use of private cars, the practices governing the handling and icing of such cars, etc., on the part of carriers, subject to the act to regulate commerce, violated that act in various ways, ordered a proceeding to be instituted by the Commission to investigate such practices. It ordered that carriers by railroad subject to the act be made parties respondent and later that all persons and corporations owning or operating cars and other vehicles and instrumentalities of shipment or carriage of property in interstate commerce be made parties also. Among the

latter was the Armour Car Lines, a New Jersey corporation. That concern owned, manufactured and maintained refrigerating, tank, and box cars and let those cars to the railroads or shippers. It also owned and operated certain icing stations on various lines of railway and from these iced and re-iced cars when sent by railroads to the icing plant. It had no control over motive power or over movement of cars that it furnished.

The ground on which the petition against the Armour Car Lines was filed was stated to be that it became the duty of the Commission to ascertain whether Armour & Company, an Illinois corporation, was controlling Armour Car Lines, the New Jersey corporation, and using it as a device to obtain concessions from published rates of transportation, and whether Armour Car Lines was receiving for its refrigerating service unreasonable compensation that inured to the benefit of Armour & Company in violation of the act. In the proceeding thus ordered certain questions were put to the Vice-President of the Armour Car Lines which he declined to answer. The Commission applied to the District Court for an order requiring the witness to answer, the order was granted and an appeal was taken directly to this Court.

Here it was held that the Armour Car Lines was not engaged in interstate commerce, and not subject to regulation by the Commission unless it could be shown to be a mere tool of the Armour Company within the purview of section 15 of the Act to regulate commerce. This appears from the following extract from the opinion:

> "If the price paid to the Armour Car Lines was made the cover for a rebate to Armour & Company or if better cars were given to Armour & Company than to others, or if, in short, the act was violated, the railroads are responsible on proof of the fact. But the only relation that is subject to the Commission is that between the railroads and the shippers. It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor. It was argued that the Commission might look into the profits and losses of the Armour Car Lines (one of the matters inquired about) in order to avoid fixing allowances to it at a confiscatory rate. But the Commission fixes nothing as to the Armour Car Lines except under Sec. 15 in the event of which we shall speak."

Regarding the position of Armour Car Lines in the pending investigation, Mr. Justice Holmes, speaking for the Court, said:

> "The Armour Car Lines not being subject to regulation by the Commission, its position was simply that of a witness interested in but *a stranger to the inquiry,* and the Commission could *not enlarge its powers* by making the company a party to the proceedings and serving it with notice." (Italics ours).

Thus it is held that a concern which is not subject to the regulatory powers of the Commission is immune from its inquisitorial powers. Such was the view of the effect of the decision taken by this Court in the later case of *United States* v. *Pennsylvania Railroad*

Company, 242 U. S. 208. There the Court, speaking of the Ellis case, said:

> "The testimony sought by the Commission was to expose and prevent what were supposed to be discriminatory practices, and the right to require the testimony depended, it was the effect of the decision, upon the relation of the Armour Company to the Armour Car Lines through the railroad, and whether what was paid to the Armour Car Lines was in effect paid to the Armour Company and made a means of discrimination. This view was rejected and it was said: 'It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or a less price to their lessor,' —the lessor of that case being the Armour Car Lines; and, as it was not shown that it was merely the tool of the Armour Company, it had *immunity* from the investigation." (Italics supplied).

The Ellis case is also cited with approval in United States *ex rel Chicago, New York and Boston Refrigeration Company* v. *Interstate Commerce Commission*, 265 U. S. 292.

Applying here the doctrine of the Ellis case it is clear that a concern such as Petitioner, which is not subject to the regulatory powers of the National Labor Relations Board, is immune from its inquisitorial powers; and that the Board cannot enlarge its powers by preferring formal charges and serving notice of a hearing thereon.

The right of the aggrieved party to challenge its action is recognized by this Court. Mr. Justice Roberts

in the case of *Washington, etc. Coach Co.* v. *National Labor Relations Board, supra,* said:

> "As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action."

When the Board preferred charges of unfair labor practice against Petitioner and served notice of a hearing thereon, it exceeded its rightful jurisdiction. That was the time to challenge its action; and this the Petitioner did in the only appropriate method, when it sought by bill in equity to enjoin further action by the Board.

As we shall have occasion to urge later herein under the head of Irreparable Injury, there is no analogy between an ordinary suit by citizen against citizen, and a proceeding by the Federal Government to investigate the affairs of a private industry whose activities lie beyond Federal control. In such case the whole power and prestige of Government, with vast resources at its command, are brought to bear upon the citizen. If he submits, he enters an unequal contest, and may be crushed by the fact alone that he has become suspect by the Government and is being investigated for supposed infraction of the law.

It was to protect the citizen against such usurpation of power by the Federal Government, that the Tenth Amendment was adopted.

This Court has always been vigilant to protect the citizen against encroachment upon his constitutional rights by agencies of Government. The evils of unwarranted investigations by Governmental bureaus are recognized by the Court in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, where Mr. Justice Sutherland, speaking for the majority (pp. 24-25) said:

> "Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.'
>
> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. United States, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our

institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments — even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

III.

The Facts Alleged in the Bill and Admitted on the Motion to Dismiss Present a Case of Irreparable Injury Requiring Injunctive Relief.

Under Points I and II, we have shown that on the facts alleged in the bill and admitted by the motion to dismiss, Petitioner is not engaged in commerce or in a business affecting commerce within the meaning of the National Labor Relations Act. The District Court so treated the case and the question is no longer open.

On this record, therefore, Petitioner is not subject to the jurisdiction of the National Labor Relations Board. Any action by said Board involving expense, loss or damage to Petitioner is wholly unauthorized.

We propose here to show that on the admitted facts, Petitioner made out a case of irreparable injury requiring the intervention of a Court of Equity.

Among the damages apprehended, as alleged in the bill, are the expenses involved both in the hearing and in any subsequent review by the Courts, which whatever its amount, can in no event be recovered; the interruption of Petitioner's business, delay in completion of ships entailing liability for demurrage; but transcending all of these in importance and in the disastrous consequences likely to ensue, was and is the threat to the peaceful relations existing between Petitioner and its employees, and the loss by Petitioner of the good will of its employees. As elsewhere stated, the charge of unfair labor practice on which the Board acted, was not instigated by any of Petitioner's employees; but was filed by a non-resident labor organization affiliated with the C. I. O.

No labor dispute of any kind existed at Petitioner's plant (Exhibit C. R. 61).

In the nearly half a century of its existence, Petitioner has been singularly free from labor troubles of any kind. This fact is recognized by the District Court in the instant case, the Court saying that it had been urged that complainant (Petitioner) would suffer irreparable damages,

> "particularly in respect of the heretofore uniformly friendly relations which it says have existed between it and its employees. I think that is a fact of which this Court might well take judicial notice, that during the many years which complainant has been in business, it has a record, so far at least as the public has known, remarkably clear of conflict between it and its employees." (R. 91).

Collective bargaining has long been practiced at Petitioner's plant through a voluntary organization of employees, which Petitioner does not dominate or control, and to the funds of which Petitioner does not contribute. Any interruption of this mutually satisfactory means of negotiating and bargaining, through the existing Plan of Employee Representation would seriously disturb the harmony and good will now prevailing at Petitioner's plant.

Petitioner has the right to the continued good will of its employees. This is expressly averred in the bill. (Art. 17, R. 12).

This right, which is admitted to be in jeopardy, is one which this Court has recognized as having an incalculably great pecuniary value. In the case of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, a labor case, which involved an injunction, it is stated:

> "In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of realtions."

This Court has also recognized the right of the citizen to carry on business unmolested by arbitrary

action. It has recognized that that right possesses pecuniary value.

In the case of *Dorchy* v. *Kansas,* 272 U. S. 306, Mr. Justice Brandeis said:

> "The right to carry on business — be it called liberty or property—has value. To interfere with this right without just cause is unlawful."

The amount of damages apprehended far exceeds the jurisdictional amount. In a suit for an injunction the value of the matter in dispute is that of the object of the bill, namely, the value to the plaintiff of the right for which he prays protection.

Bitterman v. *L. & N. R. Co.,* 207 U. S. 205.

In their brief (pages 2-3) filed in opposition to the granting of *certiorari* in this case, respondents refer to a supposed holding of the District Court that Petitioner had not made out a case of irreparable injury and suggest that its action was merely an exercise of its discretion to grant or refuse an injunction. Presumably the suggestion will be included in any brief respondent may file herein. An examination of the opinion of the District Court will show that this is not correct. It will show that the case was not decided on any such ground. The bill was dismissed because, and only because, the Court held that the Board had exclusive jurisdiction to determine questions of its own authority, and that Petitioner had "a plain, adequate and exclusive remedy under the terms of the Act itself"; and because that supposed remedy was *exclu-*

sive, the Court was *without jurisdiction* of the cause. (Opinion R. 89 and 93). Holding the view that Petitioner, whether subject to regulation by the Board or not, was obliged to follow the procedural provisions of the Act the Court, logically enough, held that any damages resulting from that procedure were in the nature of damages *absque injuria.* Accordingly it said:

> "Damages of that character, gentlemen, as I regard them, are more in the nature of damages for which there can be no recovery. I do not think, therefore, that the allegations of the bill and the affidavits with it establish a case of irreparable injury such as will justify the Court in issuing an injunction."

In support of this view, the Court quoted from *Beman* v. *Cochrell,* 88 Fed. (2) 59, as follows:

> "That the parties may be subjected to expense, annoyance and inconvenience is no adequate reason for invoking the aid of equity, as expense, annoyance and inconvenience are present in some degree in all litigation; they are but incidental burdens of civilized government."

and added:

> "It seems to me that that language applies to the case presented by the bill." (R. 91).

This view, we submit, is wholly erroneous. If, as this Court has held, the Act does not purport to reach such a business as is presented on this record, and would have been void for lack of constitutional power, if Con-

gress had so framed it to make it apply to such a business, then the procedural provisions of the Act have no application here, and the case is one of attempted exercise of arbitrary power on the part of a governmental agency. It is within the condemnation of Jones v. Securities and Exchange Commission, *supra*.

We may here repeat that there is no analogy between the ordinary litigation to which all citizens alike are subject and which may be said to be "but incidents of the burdens of civilized government"; and a public investigation by an agency of the Federal Government of matters lying outside the ambit of its constitutional powers. Such an investigation is not an "incident of the burden of civilized government", but an instance of the usurpation of power by the Board.

IV.

Petitioner Has No Adequate Remedy At Law.

The legal sufficiency of the procedure outlined in the National Labor Relations Act, *as applied to those whose activities place them within the scope of the Act,* is not questioned in this brief. This was definitely settled by the decisions of this Court in the Jones and Laughlin case.

But it is denied that that procedure can, despite a proper challenge in Court, be applied to those whose activities, like those of Petitioner, lie outside of the scope of the Act, and beyond the limits of the Board's jurisdiction, as defined by this Court.

The Court below, in common with some others, seemed to be impressed with the practical necessity of

allowing the Board to make inquiry and reach some conclusion with respect to its jurisdiction.

They overlooked the distinction, elsewhere alluded to in this brief, between an informal, preliminary inquiry which may be conducted without notice, and a formal public hearing after charges are preferred and notice is given. Both are provided for in the Act. Thus Section 5 of the Act provides:

> "The Board may, by one or more of its members or by such agent or agencies as it may designate, prosecute any *inquiry* necessary to its functions in any part of the United States." (Italics supplied).

And Section 10 (b) provides for a public hearing of charges of unfair labor practices affecting commerce, *after service of complaint and notice* upon the one to be investigated. The former is a preliminary inquiry; the latter, analogous to trial after indictment. If the Board were to avail itself of the power conferred by Section 5 of making preliminary inquiries, which may be made without notice, there would probably be fewer public proceedings started, and hence fewer complaints filed with the Courts with respect to the Board's jurisdiction. One of the charges made in the bill in the instant case is that the Board had made no preliminary inquiry or taken any evidence as a basis for the proposed public investigation. (Art. 11, R. 6).

The Act gives the Board ample power to make preliminary inquiry into all questions affecting its jurisdiction. It is possible of course that, even after making the preliminary inquiry, it may reach an erroneous conclusion as to its jurisdiction. But if, with

or without a preliminary inquiry, it starts a public investigation of a concern whose activities lie outside of the scope of the Act, and of which the Board has no jurisdiction in fact, its action may be challenged in the Courts. This we understand to be the meaning of the right of challenge expressly recognized by this Court.

The Act "purports to reach only what may be deemed to burden or obstruct", interstate or foreign commerce. The jurisdiction of the Board is "limited to those instances which fall within the commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action."

Of what avail would be a challenge before the Board itself in a proceeding which it has already determined to carry through? If the challenge can be made *only* before the Board, it is worthless. So to interpret the right of challenge recognized by this Court, is to declare that a procedure intended only for those whose activities directly and substantially affect commerce, may be applied *in invitum*, to a concern which is not in that class. Congress, we submit, has no power to subject such a concern to that procedure. It has not attempted to do so by the Act in question.

It is very respectfully submitted that the Courts should not do, in this respect, what Congress has not done.

It is further submitted, and with great respect, that this particular procedure ought not to be extended beyond the class for which it was intended.

Under that procedure the party proceeded against is under a distinct disadvantage. On petition to enforce or review the Board's order, he goes to the reviewing Court *foreclosed* as to the *facts* and *foreclosed* as to the *law* relating to the legality and admissibility of the evidence by which those facts are supported. The Act expressly provides (Sec. 10(b)):

> "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

and by Section 10 (e):

> "The findings of the Board as to facts, if supported by evidence, shall be conclusive."

If one of these provisions is valid, the other is also. If one of them is binding upon the Circuit Court of Appeals on the review provided by the Act, the other is also. The result is that the reviewing Court is deprived of any standard by which to determine whether the evidence admitted by the Trial Examiner is or is not proper legal evidence. "The rules of evidence prevailing in courts of law or equity shall not be controlling." It is common knowledge that attorneys for the Board construe this to mean that "hearsay" is legal evidence; and that in actual practice, the trial examiners admit not only "hearsay", but other matter which, by the rules of evidence prevailing in courts of law and equity, should be excluded.

The findings of the Board as to facts, if supported by evidence, although not such evidence as would be recognized as legal and admissible in a court of law or equity—are conclusive; and it is not perceived what

a reviewing court can do about it. The Act has deprived it of all standards for judging of the legality of the evidence.

Where constitutional rights are involved, the citizen is entitled to the independent judgment of the Courts of the United States on all questions both of law and of fact.

Crowell v. *Benson,* 285 U. S. 22.

The extension of the procedural provisions of the Act to Petitioner, which is beyond the scope of the Act, involves an infringement of constitutional rights.

It is respectfully submitted that the procedure outlined in the Act cannot constitutionally be applied to the Petitioner whose activities admittedly do not directly and substantially affect interstate or foreign commerce. As to Petitioner, that procedure is no remedy. It is the evil to be avoided.

Petitioner in this case has challenged the action of the Board, as this Court has said it had the right to do. It has challenged that action in the only way that a challenge could possibly be effective, namely by applying to a Court of Equity for injunctive relief. Petitioner has no adequate remedy at law, and the injunction should have been granted.

The legal remedy which will prevent equity from taking jurisdiction must be as complete and practical, as prompt and efficient as the remedy sought in equity. It must be a present remedy.

Thus in *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, this Court said:

> "This Court has repeatedly declared in affirmance of the generally accepted proposition

that the remedy at law to exclude a concurrent remedy in equity, must be as *complete* as *practical,* and as efficient to the ends of justice and its *prompt* administration as the remedy in equity." (Italics ours.)

Citing, *Boyce's Ex'ors* v. *Grundy,* 3 Pet. 210
Phoenix Mutual Ins. Co. v. *Bailey,* 13 Wall 616
Kilbourne v. *Sunderland,* 130 U. S. 505
Tyler v. *Savage,* 143 U. S. 79.

V.

The Cases Relied on By Respondents, Some of Which Are Cited in Support of the Opinion of the Circuit Court of Appeals, Are Not Controlling.

It will doubtless have been observed that, in support of the position it has taken in this brief, Petitioner has cited only the decisions of this Court; and that it relies particularly upon distinctions made in the Jones and Laughlin groups of cases, in which the scope of the National Labor Relations Act is clearly defined, and, in conformity with the Act as thus interpreted, definite limits are set to the jurisdiction of the Board. Petitioner also relies on the cases cited, page 41, *post.*

On the other hand, the cases relied on by respondents and those cited in support of the *per curiam* opinion of the Circuit Court of Appeals, are decisions, not of this Court, but of other Circuit Courts of Appeals.

True, in some of them, this Court refused writs of *certiorari*. But this is not equivalent to an affirmance. This Court has repeatedly admonished the Bar to remember that its refusal of *certiorari* in a given case is not to be understood as an approval by the Court of the decision below.

A separate analysis of each of the cases cited in support of respondent's contentions is deemed unnecessary. A large proportion of them were brought before the decision of this Court in the Jones and Laughlin and allied cases, and attacked the constitutionality of the Act. In many of them the party seeking injunctive relief was engaged in interstate commerce, and relied solely upon the alleged invalidity of the Act.

Some of these opinions reveal a misapprehension of what was decided by this Court in the Jones and Laughlin case. This is illustrated by the case of *Pratt* v. *Oberman & Company* (C.C.A. 8), 89 Fed. (2) 786, cited in the opinion below. That case was argued on appeal, before this Court had decided the Jones and Laughlin and allied cases. It was decided May 5, 1937, after the decision of this Court in those cases. The Appellate Court referred to those decisions and said:

> "The principles announced in those cases are applicable to this case and are controlling.
>
> "We do not examine the issue here as to the existence of equitable jurisdiction. Even if such jurisdiction existed at the time the injunctional order was entered, the decree must obviously be reversed upon the issue of the validity of the act, since the appellee, whether subject to the act or not, is required to avail itself of the remedies therein provided, the ade-

quacy of which remedies can no longer be questioned."

It is submitted that the Court failed to observe what this Court had said as to the scope of the Act and the limit of the Board's jurisdiction. It failed to apply the well known rule that the language of an opinion is to be restrained to the facts and circumstances before the Court when the opinion was rendered. Through this failure the Court was led into the error of supposing that when this Court approved the procedural provisions of the Act as applied to those concerns which were held to be within its scope, it meant to approve also the application of that procedure to others,

"whether subject to the Act or not."

This we think was clearly a misapprehension of the intent and effect of the decisions in the Jones and Laughlin group of cases.

Pratt v. Oberman & Company, *supra,* and Beman & Cockrell et al, *supra,* are, it is believed, the only cases cited by respondents below which apparently hold that any concern proceeded against, although not subject to the act, is obliged to exhaust the administrative remedies therein provided; which, of course, means that such concern must submit to public investigation by the Board, although not subject to its jurisdiction.

In none of the cases relied on by the respondents, so far as we have been able to discern, did the Court consider the question whether a procedure intended only for those who are within the scope of the Act, and who are subject to regulation by Congress, can, with-

out violation of constitutional rights, be applied to those who are not within the scope of the Act, and not subject to regulation by Congress.

It is respectfully submitted that *insofar* as any of those decisions can be interpreted to hold that the procedral provisions of the Act may, despite a timely challenge of the Board's jurisdiction by resort to the Court, be applied to those who are not within the scope of the Act, and not subject to the legislative control of Congress, such decisions are unsound; and not in harmony with the decisions of this Court.

In the petition for a writ of *certiorari* in this case, Petitioner referred to the case of *Myers, etc.* v. *Bethlehem Shipbuilding Corporation* (C. C. A. 1), 88 Fed. (2) 154, rehearing denied, 89 Fed. (2) 1000. *Certiorari* was granted by this Court, October Term 1937, Nos. 181 and 182. It appears that the facts in that case are substantially similar to those in the instant case, though that case was not, as was this, disposed of on a motion to dismiss the bill. It is submitted that the opinions of the Circuit Court of Appeals in that case are sound.

Finally, the Jones and Laughlin case was widely different in its facts from the case at bar. This Court has found that that company, organized on a National scale, was engaged in far flung activities involving not only production but transportation in interstate commerce.

On the other hand, respondents, by their motion to dismiss the bill, have admitted of record that Petitioner's business is local. Its employees are engaged in production; none of them in transportation. This

Court in an unbroken line of decisions has recognized the soundness of the proposition that production or manufacture, in itself, is not commerce.

Kidd v. *Pearson,* 128 U. S. 1, 20, 21;
United Mine Workers v. *Coronado Coal Co.,* 259 U. S. 344, 407, 408;
Oliver Iron Min. Co. v. *Lord,* 262 U. S. 172;
United Leather Workers International Union v. *Herkert & M. Trunk Co.,* 265 U. S. 457, 465;
Industrial Asso. v. *United States,* 268 U. S. 64, 82;
Coronado Coal Co. v. *United Mine Workers,* 268 U. S. 295, 310;
A. L. A. Schechter Poultry Corp. v. *United States,* 295 U. S. p. 547;
Carter v. *Carter Coal Co.,* 298 U. S. 238, 304, 317, 327.

These cases are cited in the majority opinion in the Jones and Laughlin case, and we understand that their soundness was not questioned. They were distinguished from the case with which the Court was then dealing.

We respectfully submit that Petitioner's business as disclosed on the record, is within the principle of these cases, and is not subject to Federal regulation.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals was and is erroneous in the particulars set out in the foregoing pages of this brief;

and that the same should be reversed, and the cause remanded to that Court with instructions to direct the District Court to grant an injunction *pendente lite;* and proceed to hear the cause on the merits.

Very respectfully submitted,

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